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No. 89-1782

In The

Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Petitioners,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

On A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF OF AMICI MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, OGLALA SIOUX TRIBE, ONEIDA TRIBE OF INDIANS OF WISCONSIN, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA, ST. CROIX CHIPPEWA INDIANS OF WISCONSIN, SEMINOLE TRIBE OF FLORIDA, SISSETON-WAHPETON SIOUX TRIBE, and THREE AFFILIATED TRIBES OF FT. BERTHOLD RESERVATION, IN SUPPORT OF RESPONDENTS

ARLINDA F. LOCKLEAR
Counsel of Record
Amicus Oneida Tribe
of Indians of Wisconsin
Post Office Box 243
Knoxville, MD 21758
(301) 834-6646

HOWARD BICHLER
Counsel for Amicus St. Croix
Chippewa Indians of Wisconsin
St. Croix Tribal Center
Post Office Box 287
Hertel, WI 54845

JUDITH A. SHAPIRO
HOBBS, STRAUSS, DEAN & WILDER
Counsel for Amici Miccosukee Tribe of
Indians of Florida, Oglala Sioux Tribe,
Seminole Tribe of Florida, & Three Affiliated
Tribes of Ft. Berthold Reservation
1819 H St., N.W.
Washington, D.C. 20006

BERTRAM HIRSCH
Counsel for Amicus
Sisseton-Wahpeton
Sioux Tribe
81-33 258th Street
New York, NY 10012

MILTON ROSENBERG
Counsel for Amicus
Red Cliff Band of Lake
Superior Chippewa
40 Glenway Street
Madison, WI 53705

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF AMICI

Amici are federally recognized Indian tribes occupying federal reservations in the states of Florida, North Dakota, South Dakota, and Wisconsin. Amici join respondents Native Village of Noatak and Circle Village urging affirmance of the Ninth Circuit decision.

Amici are generally representative of Indian tribes in the nature and quality of the relations between them and the states in which they reside. The Oneida Indian Tribe of Wisconsin, for example, has historical and as yet unresolved land claims against New York State and is presently engaged in negotiations with the State of Wisconsin regarding gaming, jurisdiction, and environmental issues. Amici Red Cliff Band of Lake Superior Chippewa Indians and St. Croix Chippewa Indians of Wisconsin are presently engaged in litigation against the State of Wisconsin involving past and on-going state violations of those tribes' treaty hunting, fishing, and gathering rights. Amicus Sisseton-Wahpeton Sioux Tribe has long-standing differences with the State of South Dakota over jurisdiction, taxation and other issues. Amicus Miccosukee Tribe of Indians of Florida has recently obtained state agreement to mediate claims arising out of state trespass on tribal trust lands. Other amici here have similar matters of concern under discussion with or litigation against states where they reside.

The suability of the various states by amici tribes is a matter of great moment in the conduct of relations on these important, governmental concerns. Without access to federal court to seek all remedies against states for

violation of the tribes' federally protected resources and governmental interests, the dynamic of the relationship between the amici tribes and the states would be dramatically altered. In the amici tribes' view, the result would be a serious erosion of tribal resources and autonomy. Amici tribes file this amici curiae brief for this reason. The brief is filed with consent of petitioners.

SUMMARY OF THE ARGUMENT

Subject matter jurisdiction over respondents' claims is a preliminary matter that must be addressed by this Court at the outset. Only if the Court finds subject matter jurisdiction over the claims need it reach the state sovereign immunity and other issues presented in the petition for certiorari. Amici tribes confine their argument here to the waiver of state sovereign immunity found in the plan of the convention.

The state sovereign immunity issue presented here requires the Court to consider for the first time the interplay between two principles basic to our federal system.[1]

[1] Lower federal courts have generally held that the states' sovereign immunity to suit does not bar money damage claims by Indian tribes. *See* Oneida Indian Nation of New York v. Oneida County, 719 F.2d 525 (2nd Cir. 1983); Cayuga Indian Nation of New York v. Cuomo, 565 F.Supp. 1297 (N.D.N.Y. 1983); Charrier v. Bell, 547 F.Supp. 580 (M.D.La. 1982); Confederated Tribe of Colville v. State of Washington, 446 F.Supp. 1339 (E.D.Wash. 1978), *rev'd in part on other grounds*, 447 U.S. 104 (1980). However, petitioners insist that this Court's recent decisions on states' sovereign immunity in other contexts have

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The first such principle is the unique status of Indian tribes as governments subject in their external relations to the United States Constitution, but not parties to it. The second is the states' sovereign immunity from suit, confirmed by the Eleventh Amendment to the Constitution.[2] The precise question is whether a narrow exception to the second principle must be made in light of the first, thereby allowing Indian tribes to sue states for money damages in federal court.

This is not a question that can be resolved by facile characterizations of tribes as more like one government than another. As this Court has frequently observed, tribes are unlike any other government within our federal system. The matter requires careful examination of the

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thrown these Indian law decisions into doubt. Petitioners' Br., p. 26 n. 18. In addition, petitioners suggest that the Court disposed of this issue in United States v. Minnesota, 270 U.S. 118 (1926). *Id.* at 17. This is plainly not so. The issue of suits by tribes against states was not before the Court there and was not briefed by the parties. The Court's passing statement on suits by Indians was more in the nature of an assumption for the purposes of argument than a reasoned analysis of the point. This is the Court's first opportunity to examine directly whether Indian tribes, because of their unique position in the federal system, can sue states for money damages in federal court.

[2] This Court considers the Eleventh Amendment to be merely an exemplification of the doctrine of state sovereign immunity, not an exhaustive statement of states' immunity from suit. Welch v. Dept. of Highways & Public Transp., 483 U.S. 468, 472 (1987); Pennhurst State Schools Hospital v. Halderman, 465 U.S. 89, 98 (1984). Thus, amici focus here on the doctrine of state sovereign immunity, not on the language and history of the Eleventh Amendment.

plan of the convention to determine whether there is in the federal structure created by the Constitution a surrender of states' immunity to suits by Indian tribes.

This examination shows that tribes have been consistently viewed and treated as governments that preceded and exist independently of the United States Constitution, but that are limited in the exercise of their inherent sovereign powers by the Constitution. Further, tribes have complex relationships with states within whose borders they reside, relationships that have historically been characterized by state transgression upon tribes' property and autonomy. The plan of the Union reflects this political reality by confirming the existence of exclusive sovereign authority for tribes and states within certain spheres, yet subjecting both to the supreme law of the land. Such a federal structure necessarily contains a surrender of states' immunity to suit by tribes. This result is an application of the well-established exception to state sovereign immunity in favor of independent governments, such as sister states and the United States, that co-exist in the federal framework.[3]

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[3] Amici tribes believe that the inquiry regarding tribes' ability to sue states is resolved by an examination of the plan of the convention, the states' immunity from tribal suits being necessarily surrendered therein. Respondents make additional arguments on this issue based upon 28 U.S.C. section 1362. *See* Respondents' Br., III, C. Amici tribes support those arguments as an independent basis for finding a waiver of the states' immunity to tribal suits and do not repeat them here.

ARGUMENT

BY CONSENTING TO A PLAN OF UNION THAT COMPREHENDS AND LIMITS INDIAN TRIBES, THE STATES WAIVED THEIR IMMUNITY TO SUIT BY TRIBES.

1. Governments that were created by or directly subject to the United States Constitution are not barred in making claims against states in federal court.

A fundamental purpose of state sovereign immunity was to protect states against private suits. In his oft-cited explication of state sovereign immunity, Hamilton carefully limited his discussion to private suits against states:

> [T]here is no colour to pretend that the State governments, would by adoption of that [constitutional] plan, be divested of the privilege of paying their debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.

The Federalist, No. 81 (J.E. Cooke Ed. 1961). This Court, too, has emphasized the lack of coercive power in private claims for money against states in holding those claims barred by state sovereign immunity, indicating that the individual in these instances must rely on the good faith and honor of the state to perform its contractual and other obligations. *See Smith v. Reeves*, 178 U.S. 436, 446-8 (1900); *Hans v. Louisiana*, 134 U.S. 1 (1890), where the Court emphasized the private status of the would-be plaintiff.

This Court also relied heavily on the distinction between private suits and those filed by other sovereigns in holding that states are subject to suit by the United States and sister states. In *United States v. Texas*, 143 U.S. 621, 646 (1892), the Court observed that suability of states rests upon different grounds where the suit is among governments rather than one brought by an individual against a government and concluded:

> The submission to judicial solution of controversies between these two governments [states and the United States], 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to objects committed to the other' [M'Culloch v. Maryland, 17 U.S. 4 Wheat 316, 400, 410] but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty.

See also Monaco v. Mississippi, 292 U.S. 313, 328 (1934) and *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), where the Court reached a similar conclusion regarding suits brought against states by a sister state. The very tranquillity and permanence of the Union might be endangered were such disputes not entrusted to the judiciary. *Monaco v. Mississippi*, 292 U.S. at 324-328.

This is not to say that every government has access to federal court to assert claims against states. The Court marked the limitations of the suit by governments exception to state sovereign immunity in *Monaco v. Mississippi*, *supra*. There, the Court held that state sovereign immunity barred suits by foreign governments against states. Foreign states, which are neither parties nor subject to the

federal structure of the Union, are not amenable to coercive jurisdiction demarcated in the Constitution and cannot invoke a waiver of state immunity found there. *Id.*

In *Monaco*, the Court had no occasion to consider whether there exist any governments in addition to sister states and the United States that, as participants in the federal structure, could find a waiver of state sovereign immunity in the plan of the convention. There is only one such group of governments that is likewise subject to the coercive authority of the Constitution – Indian tribes.

2. Indian tribes are governments limited by the United States Constitution, although not created by or parties to it.

This Court has frequently remarked upon the semi-sovereign status of Indian tribes. In *Holden v. Joy*, 84 U.S. 211, 242 (1872), for example, the Court described tribes as independent governments, though not foreign or states of the United States:

> yet in a certain domestic sense and for certain municipal purposes, they are states, and have been uniformly so treated since the settlement of our country and throughout its history, and numerous treaties made with them recognize them as people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.

See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980) and cases cited therein.

The plan of the convention reflects this view of tribes as governments. When drafting the Indian commerce clause, the delegates began with a modified version of the Indian clause of the Articles of Confederation[4], which had vested Congress with authority over Indians "not members of any of the States." Art. IX, cl. 4, Articles of

[4] The Committee on Detail's first draft constitution contained an enumeration of Congress' powers, but did not refer to Indian affairs. On August 18, Pinckney proposed that Congress be given other powers, including that "[t]o regulate affairs with the Indians, as well within as without the limits of the U.S." I Elliott's Debates on the Federal Convention 247 (Phil. 1836). These additional powers were referred to the committee which, in its second draft, included the following addition to the commerce clause: "and with Indians, within the limits of any State, not subject to the laws thereof." M. Farrand, II Records of the Federal Convention 367 (Yale U. Press 1937). On August 31, the Convention referred the second draft to the Committee of Eleven to consider parts of the constitution not yet acted upon by the Convention. IV Elliott's Debates on the Federal Convention 280. This committee simplified the language of the commerce clause to read "and with Indian tribes" in its September 4 report to the Convention. The committee's recommendation was adopted by the Convention that day. IV Elliott's Debates on the Federal Convention 283; II Records of the Federal Convention 493. When the Committee on Style reported out the final draft to the Convention, it had changed the semicolon that had preceded the Indian commerce clause into a comma. II Records of the Federal Convention 595. Thus, the convention began with a formulation very similar to the Articles of Confederation Indian commerce clause, but with the plain intent to broaden that power, eliminated the two limiting provisos that had appeared on it, and adopted the revised Indian Commerce clause with virtually no debate.

Confederation. This language was construed at the time to restrict Congress' authority to those Indians "who do not live within the body of the Society, or whose persons or property form no objects of its laws," [8 Papers of Madison 156 (R. Rutland, et al. eds.)], and to tribes considered "as independent nations," [F. Hough, Proceedings of the Commissioners of Indian Affairs, 21-22, Albany, 1861]. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1165 (2nd. Cir. 1987), *cert denied*, 110 S.Ct. 200 (1989).

This and another limiting proviso of the Articles of Confederation clause were eliminated by the convention[5], thus delivering over to Congress greater authority over

[5] Madison explained the changes made to the Articles' Indian commerce clause as follows: "The regulation of commerce with the Indian tribes is very properly unfettered from the two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of perplexity and contention in the Federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with compleat sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain." The Federalist, No. 42.

Indian affairs. *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 668 (1974). The convention replaced the Articles' reference to "Indians not members of any of the States" with a reference to Indian tribes, thus carrying forward the restriction on Congress' authority in Indian affairs to those self-governing Indian communities capable of sustaining a government to government relationship. *See United States v. Sandoval*, 231 U.S. 28, 46 (1913).

Plainly, Indian tribes are a governmental feature of the federal structure that is created by the Constitution, even though the tribes' powers as governments do not derive from the Constitution or the United States but are inherent. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978).[6] And while the Constitution vests authority in the Congress to manage affairs with Indian tribes, complex relations among the tribes, states, and the United States do exist. The boundaries separating the three governments are not absolute; as citizens of the three mingle, so must authority among the three governments shift depending upon the context and relative interests at stake. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 884 (1986). Each is sovereign with respect to the

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[6] Indian tribes are the only other source of independent governmental power, in addition to states and the United States, that operate within the geographic confines of the United States. Counties, cities, territorial governments, indeed, all forms of local government with the exception of Indian tribes, exercise only those powers expressly delegated to them either by a state or the United States. *Wheeler, supra* at 320-22.

objects committed to it, yet all are subject to the supreme law of the land. *See United States v. Texas*, 143 U.S. at 646.

There are no provisions in the Constitution which directly or explicitly limit tribal powers, the tribes not being participants at the convention or signatories to the Constitution. *United States v. Wheeler, supra; Talton v. Mayes*, 163 U.S. 376, 384 (1896). Yet, this Court has indicated that, by virtue of their physical location within the geographic boundaries of the United States and states, Indian tribes are limited in their external relations, even on tribal territory, by the sovereign powers of those governments as defined in the Constitution.

The most elaborate explication of this doctrine is found in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The precise question there was whether tribes could exercise criminal jurisdiction over non-Indians on the Indian reservations. In holding that tribes could not do so, the Court observed that there are limitations on tribal powers that stem from tribes' incorporation into the United States. These include the power to dispose of tribal land to whomever and under any circumstances they pleased [(*Oneida Indian Nation of New York v. Oneida*, 414 U.S. 661)] and the conduct of relations with foreign nations [(*Cherokee Nation v. Georgia*, 30 U.S.(5 Pet.) 1, 17-18 (1831)].

In *Oliphant*, the Court found a further limitation on tribes' external sovereignty emanating from the Bill of Rights. The Court described the "great solicitude that its [United States] citizens be protected by the United States from unwarranted intrusions on their personal liberty . . . " reflected in the adoption of the Bill of Rights. *Id.*

at 210. As a result, Indian tribes necessarily gave up their power to try non-Indian citizens of the United States by submitting to the overriding sovereignty of the United States. *Id.; see also Duro v. Reina,* 110 S.Ct. 2053 (1990), (tribes lack criminal jurisdiction over non-member Indians, even when the crime occurred on the tribe's territory); *Brendale v. Confederated Tribe and Bands of the Yakima Indian Nation,* 109 S.Ct. 2994 (1989) (tribes lack authority to regulate by zoning ordinance fee owned land on the reservation); and *Montana v. United States,* 450 U.S. 544 (1981), (tribes lack authority to regulate on-reservation hunting and fishing of non-members on fee lands).

Although not in the context of tribal suits against states, this Court has thus already addressed the basic inquiry in determining whether federal courts have jurisdiction over such suits. It has held Indian tribes to be independent governments that are subject to the Constitution in all their external relations, even though not parties to the Constitution, warranting a waiver of state sovereign immunity to tribal suits based upon the plan of the convention. *Cf. Smith v. Reeves, supra; United States v. Texas, supra,* (state immunity from private suits and state suability by the United States due to private or governmental status of the plaintiff). It has also held that state and federal coercive authority extends to tribal territory even though tribes retain limited powers of sovereignty, reflecting the complex and intense relationships among the three governments. *Cf. Monaco v. Mississippi, supra,* (state immunity to suit by foreign nations due to the absence of coercive authority in the federal system against foreign governments). As a consequence, Indian

tribes are inherently sovereign governments that are limited by and comprehended within the plan of the convention and are not barred in their claims against states.

3. That the plan of the convention must contemplate tribal suits against states is demonstrated by the history of state intrusion upon tribal property and autonomy.

In 1790, President Washington assured Chief Cornplanter of the Seneca Nation that Congress had, with enactment of the Indian Trade and Intercourse Act of July 22, 1790, 1 Stat. 137, provided a means whereby tribes could seek judicial redress for violation of tribal land rights by states and others:

> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States . . .
>
> If . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.

4 American State Papers, Indian Affairs, Vol. 1, p. 142 (1832). President Washington plainly assumed that tribes could sue to protect their property rights and that such suits might be filed in federal court against states.[7]

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[7] Federal courts lacked federal question jurisdiction until 1875. See Judiciary Act of March 3, 1875, 18 Stat. 470. And the Supreme Court's original jurisdiction would not extend to suits by tribes, since tribes are neither states nor foreign countries.

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President Washington's statement was made against a historical background of state and tribal conflict over preservation of tribal resources, particularly land. This history of conflict has led this Court to observe that Indian tribes owe no allegiance to and receive no protection from the states in which they reside. To the contrary, the people of the states where tribes are found have often been those tribes' deadliest enemies. *United States v. Kagama*, 118 U.S. 375, 384 (1886). This history of conflict also supports an exception to states' sovereign immunity for suits by Indian tribes in the interest of creating and preserving a more perfect Union. *Monaco v. Mississippi*, 292 U.S. at 328; *United States v. Texas*, 143 U.S. at 644-45.

The earliest conflicts between tribes and states occurred with regard to tribal lands, lands that had been guaranteed to the tribes in federal treaties.[8] Typically, the treaties demarcated tribal territory and non-Indian

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Cherokee Nation v. Georgia, *supra*. However, tribal plaintiffs could and did sue in state court before the federal courts acquired federal question jurisdiction. See Oneida v. Oneida Indian Nation, 470 U.S. 226, 255 n.1 (1985) (J. Stevens, dissenting).

[8] These competing interests were the principal sources of controversy over Indian affairs during debate of the Articles of Confederation. The so-called landed states, i.e., those that claimed expansive western territories, were very jealous of their title to Indian lands, a title interest that vested only when the tribes' title thereto had been extinguished by treaty. The ambiguous limitations on the Indian commerce clause of the Articles of Confederation were adopted in an effort to achieve consensus on this point. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558-59 (1832); Oneida Indian Nation of New York v. State of New York, 860 F.2d 1145.

settlement on tribal lands was prohibited. These provisions were necessary in Congress' view to halt state sponsored trespass and settlement upon tribal lands. As Congress stated in its directions to the southern federal treaty commissioners:

> The great source of contention between the said states and the Indian tribes being boundaries, you will carefully inquire into and ascertain the boundaries claimed by the respective states. And although Congress are of opinion that they might constitutionally fix the bounds between any state and an independent tribe of Indians, yet unwilling to have a difference subsist between the general government and that of the individual states, they wish you so to conduct the matter, that the states may not conceive their legislative rights in any manner infringed;

XXXIII Journals of the Continental Congress 706-07, October 25, 1787.[9] Three states – Georgia, New York, and North Carolina, took particular umbrage at federal efforts to protect tribes in the possession of their lands.

Georgia simply ignored the federal treaties guaranteeing Creek territory and treated directly with

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[9] *See* Treaty of Fort Stanwix with the Six Nations, 7 Stat. 15, October 22, 1784; Treaty with the Wyandots and Others, 7 Stat. 16, January 21, 1785; Treaty of Hopewell with Cherokee, 7 Stat. 18, November 28, 1785; Treaty of Hopewell with Choctaw, 7 Stat. 21, January 3, 1786; Treaty of Hopewell with Chickasaw, 7 Stat. 24, January 10, 1786; Treaty with the Shawnee, 7 Stat. 26, January 31, 1786.

individual Creeks to acquire those lands.[10] Congress' alarm at Georgia's actions was so great that in 1785, Georgia congressman William Houston wrote the Governor: "that the whole body of Congress is become so clamorous against our state that I shudder for the consequences . . . it is very seriously talked of, either to make a trial of voting Georgia out of the Union or to fall upon some means of taking coercive measure against her." III Documentary History of the Ratification of the Constitution 205. While less direct in their actions, New York and North Carolina similarly disputed federal authority to conclude treaties with tribes that guaranteed them possession of land within state borders.[11]

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[10] Georgia adopted and acted upon a blatant policy of dispossessing the Creek Nation of its lands, notwithstanding federal treaties and policy to the contrary. State representatives negotiated so-called treaties with individual Creeks and took immediate steps to establish state jurisdiction over those lands. Counties were created in the territory and the area was opened for settlement. The Creek Nation violently objected to these pretended purchases and the intrusions upon their territory, threatening war. It is commonly assumed that Georgia ratified the Constitution quickly because of the mounting threat of war with the Creeks and the state's need for defensive aid from an effective general government. III Documentary History of the Ratification of the Constitution, State Historical Society of Wisconsin (1978), p. 205.

[11] New York unsuccessfully attempted to thwart federal negotiations with the Six Nations at Fort Stanwix. And North Carolina asked Congress to disavow its treaties with the Cherokees and Chickasaws insofar as they secured tribal lands within the state; the Congress refused. Neither state made any

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Toward the end of the confederation period, Secretary of War Knox made a series of anxious reports to Congress on state violations of federal treaties and Congress' standing committee on Indian affairs made several recommendations for resolving the impasse. *See generally, American Indian Policy in the Formative Years*, p. 32-40. Yet, the Continental Congress was unable or unwilling to take effective action, due in part to its limited coercive power and in part to its interest in maintaining good relations with the states for other purposes. *See M. Farrand, The Framing of the Constitution of the United States*, (Yale U. Press 1913) sections 29-31; *Oneida Indian Nation of New York v. State of New York*, 860 F.2d at 1157-60.

Sadly, state sponsored incursions on tribal resources and governmental rights have continued, as has the need for means of redress. The Oneida land claim cases, considered twice by this Court and in which amicus Oneida Indian Tribe of Wisconsin is a party, are an example. The record there shows that new York State repeatedly dispossessed the Oneidas of portions of tribal land in knowing violation of federal law. *See Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661; *Oneida v. Oneida Indian Nation*, 470 U.S. 226. *See also, Worcester v. Georgia*, 31 U.S. 515, state violation of tribe's jurisdictional autonomy; *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al.*, 653 F.Supp. 1420 (W.D. Wis. 1987) (in which amici Red Cliff Band of Lake

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effort to restrain non-Indian intrusions on tribal land and tensions mounted, as in Georgia. F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834 (1962), p. 33-37.

Superior Chippewa and St. Croix Chippewa Indians of Wisconsin are parties), state abridgement of tribes' treaty based fishing, hunting, and gathering rights.[12]

Here, even more so than in suits between states, the creation and preservation of a more perfect Union compel state susceptibility to suit by Indian tribes. State/tribal conflicts were direct and potentially violent at the time of the federal convention. The delegates were aware of these conflicts and sought to provide tribes some effective means of redress against states other than resort to war. *See e.g.*, The Federalist No. 3, where Jay argued in support of a general restraining power:

> because such violences are more frequently caused by the passions and interests of a part than of the whole, of one or two States than of the Union. Not a single Indian war has yet been occasioned by aggressions of the present Federal Government, feeble as it is, but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who are either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants.

[12] In all these cases, the United States could have and arguably should have sued on the tribes' behalf to protect trust property. However, the Secretary of the Interior has wide discretion in determining when to institute legal proceedings on behalf of tribes. Creek Nation v. United States, 318 U.S. 629, 639 (1943). This discretion has been exercised in favor of litigation on tribes' behalf more or less sparingly over the course of the tribal/federal relationship, depending on prevailing political and other factors. *See, e.g.*, Congress' reluctance to take firm steps to protect the southern tribes in the possession of their treaty-protected territory in 1785. See p. 15, *supra*. This Court has indicated, however, that tribes have a general legal right to sue themselves that is not foreclosed by the United States' ability to sue on behalf of tribes. *Creek Nation*, 318 U.S. at 640.

See also Madison's comments on the New Jersey plan considered by the convention:

> Will it prevent encroachments on federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic ancient and modern. By the federal authorities, transactions with the Indians appertain to Cong. Yet in several instances, the States have entered into treaties and wars with them.

I Records of the Federal Convention 316. Given this historical background, the federal structure that emerged from the convention must have allowed for suits by tribes against states. *See Monaco v. Mississippi*, 292 U.S. at 329.

The state amici attempt to resist the force of these historical circumstances by observing that inasmuch as tribes are immune from suits by states, states must likewise be immune from suits by tribes. Amici States' Br., p. 20. Their argument on this score both assumes too much and proves too little.

First, the amici argument on reciprocal immunity between tribes and states wrongly assumes that those two entities are legal equivalents. That is not the case. States are direct participants in the Constitution, while tribes are not. States enjoy reserved powers under the Constitution, while tribes do not. Because of the basic differences in form, origin, and authority, logic does not compel that tribes be treated as the legal equivalent of states.

Second, reciprocal immunity between tribes and states does not exist, regardless of whether tribes can sue states directly. It is indisputable that the United States can, and oftentimes does, sue states on behalf of Indian tribes, without a reciprocal right on the part of states to sue the United States on tribal matters. Thus, the sovereign immunity of states in their relations with Indian tribes has already been pierced, so that less is at stake when the only question is whether tribes can sue states without the United States as co-plaintiff.

Third, and most importantly, states have access to political means to set right any imbalance in state/tribal relations, while tribes do not. States are represented directly in the Congress and can obtain there a statutory waiver of tribes' immunity from suit. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribes on the other hand have no direct representation in the Congress and thus lack the political means to obtain a statutory waiver of the states' immunity from suit. As a consequence, tribes and states have grossly unequal ability to obtain political redress for grievances so that mutual immunity from suit should not be expected.[13]

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[13] States' ability to obtain federal legislation adjusting their relationship with tribes is a formidable and effective check on tribal authority. In 1953, for example, certain states convinced Congress to delegate to them civil and criminal jurisdiction over Indian lands located within their borders, even without the consent of the tribes affected. *See* Public Law 280, Act of August 15, 1953, 67 Stat. 588. Tribes objected to Congress' failure to require tribal consent to state assumption of jurisdiction, but the statute was not amended to require such

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CONCLUSION

Indian tribes are governments that feature in the federal structure, but have been invested with no indefeasible powers by the Constitution. Indian tribes also reside within the confines of states and the United States, with whom tribes of necessity have complex and oftentimes contentious relations. The maintenance of justice and of peaceful relations between state and tribal governments, and thus the preservation of the Union as reflected in the plan of the convention, requires that tribes are able to sue states in federal court.

Respectfully submitted,

ARLINDA F. LOCKLEAR
Counsel of Record
Amicus Oneida Tribe
of Indians of Wisconsin
Post Office Box 243
Knoxville, MD 21758
(301) 834-6646

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consent until 1968. *See* Act of April 11, 1968, 82 Stat. 73, 78-79. More recently and also over tribes' objection, states obtained federal legislation limiting tribes' right to conduct gaming operations on tribal lands free of state restrictions. *Compare* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), *with* the Indian Gaming Regulatory Act of October 17, 1988, 102 Stat. 2467. Of course, the states' political wherewithal to obtain redress against tribes is a feature of the plan of the Union, just as is tribes' ability to obtain judicial redress against states.

HOWARD BICHLER
Counsel for Amicus St. Croix
Chippewa Indians of Wisconsin
St. Croix Tribal Center
Post Office Box 287
Hertel, WI 54845

JUDITH A. SHAPIRO
HOBBS, STRAUSS, DEAN & WILDER
Counsel for Amici Miccosukee
Tribe of Indians of Florida,
Oglala Sioux Tribe, Seminole
Tribe of Florida, & Three
Affiliated Tribes of
Ft. Berthold Reservation
1819 H St., N.W.
Washington, D.C. 20006

BERTRAM HIRSCH
Counsel for Amicus
Sisseton-Wahpeton
Sioux Tribe
81-33 258th Street
New York, NY 10012

MILTON ROSENBERG
Counsel for Amicus
Red Cliff Band of Lake
Superior Chippewa
40 Glenway Street
Madison, WI 53705